STATE OF MICHIGAN

COURT OF APPEALS

DOROTHY GRIGSBY, Personal Representative of the Estate of MARK GRIGSBY, Deceased,

Plaintiff-Appellant,

v

ROBERT M. MERION, M.D., DARRELL CAMPBELL, M.D., JEFFREY PUNCH, M.D., JEFFREY D. CLEMENT, M.D., and DR. ERIC YOUNG,

Defendants-Appellees.

UNPUBLISHED
March 12, 1999

No. 201607
Washtenaw Circuit Court
LC No. 93-000750 NH

DOROTHY GRIGSBY, Personal Representative of the Estate of MARK GRIGSBY, Deceased,

Plaintiff-Appellant,

v

UNIVERSITY OF MICHIGAN REGENTS, d/b/a UNIVERSITY OF MICHIGAN HOSPITAL,

Defendant-Appellee.

No. 201608
Court of Claims
LC No. 93-015079 CM

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

In Docket No. 201607, plaintiff appeals by right the trial court's judgment of no cause for action entered in favor of the individual defendants following a jury trial. In Docket No. 201608,

plaintiff appeals by right the Court of Claims' judgment of no cause for action entered in favor of defendant U of M Hospital following a bench trial. We affirm.

This medical malpractice action arises from the death of Mark Grigsby following complications from a kidney transplant performed on January 20, 1993, at the University of Michigan Hospital. He was discharged on January 27, 1993, but returned to the hospital two days later with an elevated temperature, low and dropping platelet level, and rising creatinine level. A needle biopsy into his transplanted kidney was performed to determine the cause of the complications. When his condition worsened and the symptoms did not provide a definitive cause, a second needle biopsy was performed on February 2, 1993. Grigsby died from cardiac arrest when bleeding after the second biopsy could not be contained.

Plaintiff's complaint alleged that defendants breached the applicable standard of care by failing to adequately test the level of platelets in Grigsby's blood before performing the second needle biopsy, failing to consult a hematologist to determine the reasons for the drop in his platelet level, performing a second needle biopsy when Grigsby's blood platelet count was at an unsafe level, and failing to perform a repeat blood count after the second biopsy yet before Grigsby went into cardiac arrest.

On appeal, plaintiff first contends that the trial court erred in determining that her expert, Dr. Light, a transplant surgeon, had not established an issue of fact with regard to whether the standard of practice for defendants, who were transplant surgeons, transplant nephrologists, and nephrologists, required a hematology consult. We disagree. Proof of medical malpractice claims requires demonstration of four factors: (1) the applicable standard of care, (2) defendant's breach of that standard of care, (3) injury, and (4) proximate causation between the alleged breach and the injury. To survive a motion for directed verdict, the plaintiff must make a prima facie showing regarding each element. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). We agree that Dr. Light's testimony did not establish an adequate foundation for Dr. Klein's testimony. Dr. Light did not state that the standard for care for surgeons practicing in the field of transplantology and renal biopsies required a hematology consult, although he thought that the average surgeon would want one. Thus, plaintiff failed to make a prima facie case concerning the need for a hematological consult. *Id.* Accordingly, the trial court did not abuse its discretion in restricting the testimony of Dr. Klein, an expert in hematology, or in granting the motion for partial directed verdict on the claim of failure to request a hematology consult. *Id.; People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

Second, plaintiff claims that the trial court erred by participating in an ex parte communication with the jury during deliberations, and by denying the jury's request to review the testimony of two witnesses. Apparently, neither the parties nor the trial court could confirm, however, whether the trial court sent a note to the jury in response to the jury's request for the depositions of a doctor, nurse, and a medical chart; the jury did, however, only receive the chart for purposes of its deliberations. Moreover, neither attorney initialed the note, as was the court's practice when sending notes back to the jury.

The linchpin of whether an ex parte communication with the jury will result in reversal centers on a showing of "any reasonable possibility of prejudice." *People v France*, 436 Mich 138, 142; 461

NW2d 621 (1990). Trial courts engage in categories of communications with respect to a deliberating jury: (1) substantive, (2) administrative, and (3) housekeeping. Only substantive communications, such as supplemental instructions on the law, carry a presumption of prejudice. *Id*. at 142-143. "Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption." *Id.* at 143. Here, the court's written communication to the jury was an administrative one. The court merely informed the jury regarding the availability of certain pieces of evidence and did not give the jury any instructions on the law. *Id*. at 143-144.

Although it is not clear whether the jury actually received the trial court's note, the note merely informed the jury that the court could not provide the requested deposition testimony "at this time" and that it should therefore use its collective memories to recall the testimony "for the time being." The note did not convey to the jury that it was foreclosed from requesting the testimony at a later time. MCR 6.414(H). Therefore, on this record, we conclude that plaintiff was not prejudiced by the ex parte communication, assuming that the jury received it.

Third, plaintiff alleges that the trial court abused its discretion by harassing and embarrassing her expert witness during cross-examination. We disagree. This Court will review the questions and comments of the trial court to determine whether they denied the plaintiff a fair trial. *People v Moore*, 161 Mich App 615, 616; 411 NW2d 797 (1987). The test is whether the trial court's questions and comments "may well have unjustifiably aroused suspicion in the mind of the jury" as to a witness' credibility and whether partiality "quite possibly could have influenced the jury to the detriment of the plaintiff's case." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992), quoting *People v Redfern*, 71 Mich App 452, 457; 248 NW2d 582 (1976); *Moore, supra* at 617. We are satisfied that the trial court's instructions and statements to plaintiff's expert witness during cross-examination were within the bounds of MRE 611(a). The trial court asked Dr. Light to listen to the questions, restrict his answers to the question being asked, and that it was "appropriate to get a yes or no to a statement that can be answered that way." These statements did not rise to the level of harassment or cause undue embarrassment to the witness. We find, therefore, that the court's statements could not have possibly influenced the jury to the detriment of plaintiff's case.

Next, plaintiff contends that she was denied a fair trial because of defense counsel's remarks made during opening and closing argument. When reviewing asserted improper conduct by a party's lawyer, this Court must first determine whether there was error and, if so, whether the error requires reversal. *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990). "A lawyer's comments usually will constitute cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial." *Id.* Reversal may also be required where counsel's remarks deflected the jury's attention from the issue involved and had a controlling influence upon the verdict. *Id.* Reversal may also depend upon whether the jury was properly instructed. *Szymanski v Brown*, 221 Mich App 423, 429; 562 NW2d 212 (1997).

During both opening and closing statements, defense counsel told the jury that, if plaintiff's allegations were true, "we wouldn't be here." Plaintiff did not object to these remarks. Her failure to object and request a curative instruction requires a determination whether the alleged error may have

played too large a role and denied plaintiff a fair trial. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982). To determine whether error was harmless, we inquire as to whether the error was so offensive to the maintenance of a sound judicial process that it can never be harmless, and, if not, was error harmless beyond a reasonable doubt. *Id.* at 103, n 7.

We agree that defense counsel's remarks were improper. The implication was that, if defendants had been negligent, they would have admitted it and settled the matter with plaintiff. Evidence of settlement negotiations is inadmissible to prove either liability or the amount of damages. MRE 408; *Arnold v Darczy*, 208 Mich App 638, 640; 528 NW2d 199 (1995). Reversal is not required in this case, however. The remarks did not deflect the jury's attention from the issues involved and did not have a controlling influence upon the verdict. The record does not indicate a deliberate course of conduct by defense counsel aimed at preventing a fair and impartial trial. Furthermore, the court instructed the jury that the statements and arguments of counsel are not evidence and that it must disregard any argument not supported by the evidence. Accordingly, plaintiff was not denied a fair trial.

Plaintiff's fifth claim on appeal is that the trial court committed reversible error by giving SJI2d 30.04 to the jury. We disagree. When a party requests, a standard jury instruction, it must be given if it is applicable and accurately states the law. Failure to give the instruction is a basis for reversal if it results in unfair prejudice to the complaining party. MCR 2.516(D)(2); *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 622; 563 NW2d 693 (1997), lv gtd in part 457 Mich 870 (1998). The determination whether an instruction is accurate and applicable to a case is in the sound discretion of the trial court. There is no error requiring reversal if, on balance, the theories and the applicable law were adequately and fairly presented to the jury. *Rice v ISI Manufacturing, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994).

SJI2d 30.04 sets forth the standard cautionary instruction on medical uncertainties and the inherent risks in medical treatment that are beyond a doctor's control. It "accurately and concisely informs the jury of the source from which a doctor's liability springs in a medical malpractice action." *Domako v Rowe*, 184 Mich App 137, 149-150; 457 NW2d 107 (1990), aff'd 438 Mich 347; 475 NW2d 30 (1991); see also *Jones v Porretta*, 428 Mich 132, 144-146; 405 NW2d 863 (1987).

The testimony at trial could have led a reasonable jury to conclude that the conditions that caused Mark Grigsby's death developed as a result of risks inherent in the medical treatment received, not because of negligence. Such a conclusion was consistent with defendants' theory of the case. Thus, the instruction was supported by the evidence, and all the requirements of MCR 2.516(D)(2) were satisfied. *Domako, supra* at 150. Accordingly, the trial court did not abuse its discretion in giving SJI2d 30.04. *Rice, supra.*

Finally, we disagree with plaintiff's argument that the trial court's findings of fact and conclusions of law were clearly erroneous. They were supported by evidence that defendants and their experts introduced into evidence. When testimony conflicts, the trier of fact must determine

the credibility of witnesses. Conflicting testimony or questions concerning the credibility of a witness are not generally sufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 636-638; 576 NW2d 129 (1998).

We affirm.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey